

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN N.S. CHEUNG INC., a
Washington corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. CV04-2050 RSM

PLAINTIFF'S ADDITIONAL
FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER AND JUDGMENT

Plaintiff Steven N.S. Cheung Inc. (the "Company"), through its counsel of record,
Preston Gates & Ellis LLP, proposes these Additional Findings of Fact and Conclusions of
Law:

THIS MATTER was tried to the Court, without a jury, from September 25, 2006 to
September 27, 2006. Supplemental post-trial testimony was taken on September 28, 2006.
The undersigned judge presided at the trial. The claims presented at trial for adjudication
were as follows:

1. The Company's claim that, under 26 U.S.C. § 7426, the IRS wrongfully levied
upon the Company's checking account at Bank of America.

PLAINTIFF'S PROPOSED ADDITIONAL
FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER AND JUDGMENT - 1
Case No. CV04-2050 RSM

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1 2. The Company's claim that, under 26 U.S.C. § 7426, the IRS wrongfully levied
2 upon the Company's investment account at Salomon Smith Barney ("Smith Barney").

3 3. The Company's claim that, under 26 U.S.C. § 7426, the IRS wrongfully levied
4 upon a check that was sent to the IRS by William P. Shannahan, the Company's counsel.¹

5 The Company appeared at the trial through its representative, Cecile Cheung, and its
6 attorneys of record, David J. Lenci and Michael K. Ryan. The Government appeared at trial
7 through its attorneys of record, W. Carl Hankla and Justin S. Kim of the U.S. Department of
8 Justice.

9 The witnesses who testified at the trial were: Janet Freeman, Mary "Molly" Mahoney,
10 Michael Kolpack, Cecile Cheung, Amy Albee, Paul Nicholson, Lawrence Henshaw, Karin
11 Beard, Cheryl Roberts and Grace Park. The testimony of Ronald Cheung was submitted by
12 deposition, with both sides making designations of testimony for the Court's consideration.

13 The exhibits, which were offered, admitted into evidence, and considered by the
14 Court, are set forth in the list attached as Exhibit A.

15 By agreement of the parties and with the permission of the Court, the defendant
16 Government went first, and put on its evidence on the issue of "nexus" between the taxpayer
17 and the levied upon property. The Government has the burden of persuasion on that issue. At
18 the conclusion of the Government's evidence on September 27, 2006, the Plaintiff moved for
19 judgment on partial findings, pursuant to Rule 52(c) of the Federal Rules of Civil Procedure.
20
21 Hearing argument on the motion and considering the evidence presented to that point in the
22

23 ¹ The Company's claims, pursuant to 26 U.S.C. § 7426(h), that Government and IRS officials acted
24 intentionally, recklessly, and/or negligently in conducting one or more of the above levies and the
25 Company's claims, pursuant to 26 U.S.C. § 7430, that the Government's conduct in connection with
26 one or more of the levies, or its litigation position, was not substantially justified are reserved for post-
judgment proceedings.

1 trial, the Court granted the motion and made certain oral findings on the record. A transcript
 2 of the Courts oral findings (pages 134-158 of 9/27/06 trial transcript) is attached hereto as
 3 Exhibit B and its oral findings are incorporated herein.²

4 So as to make the record of the decision in this case complete, the Court hereby makes
 5 the following additional findings of fact, to augment its oral findings reflected in Exhibit B.
 6

7 **ADDITIONAL FINDINGS OF FACT**

8 1. Plaintiff, Steven N. S. Cheung, Inc., was formed on July 5, 1977 by Dr. Steven
 9 Cheung ("Dr. Cheung"), an economics professor and consultant.

10 2. At the time of its formation, Dr. Cheung was the sole shareholder, President,
 11 Treasurer and Director of the Company.

12 3. Dr. Cheung held 100 shares of stock of the Company at its formation, which
 13 was all the stock that was ever issued.

14 4. The Company has been a registered and licensed Washington State corporation
 15 each year since the date of its original incorporation in 1977 to date.

16 5. On July 1, 1994, Dr. Cheung transferred 49 of his shares in the Company to
 17 Linda Su, Ronald Cheung, and Cecile Cheung as joint tenants with right of survivorship. The
 18 purchase price was \$490.00 in exchange for 49 shares. (Ex. 8)

19 6. On August 1, 1995, Dr. Cheung transferred 49 of his shares in the Company to
 20 Linda Su, Ronald Cheung, and Cecile Cheung as joint tenants with right of survivorship. The
 21 purchase price for these 49 shares was \$490.00. (Ex. 9)

22
 23 ² On September 28, 2006, the Court heard the testimony of William Shannahan, proffered by Plaintiff
 24 in connection with anticipated post judgment proceedings to determine whether the Government has
 25 any additional financial liability to the plaintiffs, pursuant to 26 U.S.C. § 7426(h) or 26 U.S.C. § 7430,
 26 or both. In addition, the Court admitted the following Exhibits at that time: Ex. 51, Ex. 53, Ex. 84,
 and Ex. 188. That testimony and those exhibits were not a part of the principal trial nor are they
 encompassed by these Findings and Conclusions on the "nexus" issue.

1 7. As of the effective date of the August 1, 1995 share transfer, the stock
2 ownership of the Company was apportioned as follows: Steven N. S. Cheung - 2%; Linda Su,
3 Cecile Cheung and Ronald Cheung (jointly) 98%.

4 8. The transfer of the ownership of the Company to Linda Su, Ronald Cheung
5 and Cecile Cheung was a bona fide transfer by Dr. Cheung to other members of his family.

6 9. At the May 16, 1996 annual meeting of directors and shareholders of the
7 Company, the following officers were elected: President: Linda Su; Vice President: Cecile
8 Cheung; Secretary & Treasurer: Ronald Cheung. (Ex. 17)

9 10. In addition, at the May 16, 1996 annual meeting, the following individuals
10 were named to the Company's Board of Directors: Linda Su, Ronald Cheung, Cecile Cheung.
11 (Ex. 17)

12 11. At a meeting of shareholders and directors of the Company on November 1,
13 2002, Arthur Circo was elected Secretary of the Company and Annie Su was elected as a
14 director of the Company. (Ex. 22)

15 12. As of May 1996 to the present, Dr. Cheung has not held an officer's position or
16 been on the Board of Directors of the Company or any of its subsidiaries.

17 13. As of May 1996 to the present, the Company's minutes do not reflect Dr.
18 Cheung's participation in any corporate meetings or decisions.

19 14. Article IX of the Company Bylaws provides that persons who serve as
20 directors or officers of the Company are entitled indemnification of attorneys fees incurred by
21 them in connection with civil or criminal proceedings to which they are or may be parties by
22 reason of actions taken as a director or officer, whether they are a director or officer at the
23 time of incurring said attorneys fees. (Ex. 2)

24 15. As of January 2003, the Company had three wholly owned subsidiaries: West
25 Coast Land Investments, Thesaurus Fine Arts, and Dow Elco.
26

1 16. On January 27, 2003, \$350,000.00 in funds from Dow Elco, a wholly owned
2 subsidiary, was deposited by check in the Company's Bank of America corporate checking
3 account. (Ex. 31)

4 17. At the time, Linda Su, Ronald Cheung, Cecile Cheung, Arthur Circo, and
5 Annie Su were the only authorized signatories on that account. (Ex. 54 and Ex. 55)

6 18. On January 31, 2003, Arthur Circo, an authorized signatory on the Company's
7 Bank of America corporate checking account, attempted to wire transfer \$350,000 to the
8 account of Imperial West, Inc. at a bank in Hong Kong.

9 19. As of March 18, 1991, an agreement had been entered between Imperial West,
10 Inc. and the Company providing for a loan facility of \$12 million. (Ex. 29)

11 20. The purpose of the attempted wire transfer by Arthur Circo on January 31,
12 2003 was to make a payment to Imperial West, Inc. on behalf of the Company.

13 21. Previous loan payments had been made by the Company to Imperial West Inc.
14 (Exs. 185 & 186).

15 22. This loan between the Company and Imperial West has been reflected as a
16 liability in the company's federal tax returns from at least July of 1994 through June of 2003.
17 (Ex. 117-125)

18 23. In May 2003, Linda Su of the Company and Karin Beard and Cheryl Roberts
19 of DeCaro & Roberts, the Company's accountants, emailed one another regarding
20 discrepancies and confusion in how loan payments to Imperial West were being accounted for
21 in the Company's books. (Ex. 185 & 186). The confusion was thereafter resolved to their
22 satisfaction.

23 24. In the morning of February 5, 2003, various officials from the Internal
24 Revenue Service, including Revenue Officer Mike Kolpack and Special Agent Mary "Molly"

1 Mahoney, met to discuss a potential jeopardy assessment against Dr. Cheung and whether to
2 levy against him and the Company.

3 25. At the meeting of the IRS officials on February 5, 2003, the determination was
4 made to make a jeopardy assessment against Dr. Cheung for his 1993 individual federal
5 income taxes in the amount of \$1,397,079.00 and a further determination was made that the
6 funds in the Bank of America corporate checking account were being held by the Company as
7 “nominee” for Dr. Cheung.

8 26. Officer Kolpack testified that he was “not aware of any” specific evidence that
9 Dr. Cheung directed any of his family members to send money out of the Bank of America
10 account.

11 27. The Internal Revenue Manual contains express provisions addressing the
12 determination of nominee liens and alter ego liens. (Ex. 44) These provisions were not
13 consulted by Officer Kolpack or Special Agent Mahoney prior to the February 5, 2003
14 meeting.

15 28. The jeopardy assessment and related liens and levies were not related to the tax
16 returns of Linda Su, Cecile Cheung, Ronald Cheung, or the Company for 1993.

17 29. Revenue Officer Kolpack had been assigned to the matter on February 5, 2003,
18 the same day the assessment and nominee levy decisions were made. (Ex. 127)

19 30. In Revenue Officer Kolpack’s experience with other levies, the IRS takes
20 several months to complete its investigation and subsequent “nominee” or “alter ego”
21 determinations.

22 31. In Revenue Officer Kolpack’s view, the tax assessment on February 5, 2003
23 effectively created a lien on the Company’s property, regardless of whether written liens got
24 properly recorded.
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1 32. On February 5, 2003, the IRS issued and served a Notice of Jeopardy Levy and
2 Right of Appeal on Steven N.S. Cheung, Inc. as nominee of Steven N.S. Cheung at the
3 residence of Dr. Cheung and Linda Su. (Ex. 37)

4 33. Officer Kolpack testified that the IRS did not consider nor approve a levy
5 based on the concept of “alter ego”.

6 34. The IRS subsequently received \$353,575.93 from the Bank of America
7 corporate checking account on March 31, 2003. (Ex. 157) (Ex. 127, pp. US135-6)

8 35. Dr. Cheung did not have control or beneficial ownership of the funds in the
9 Company’s Bank of America corporate checking account when they were seized.

10 36. Later in February 2003, IRS Special Agent Mahoney confirmed information
11 that Dr. Cheung and the Company had investment accounts at Smith Barney.

12 37. On February 20, 2003, the IRS prepared a notice of nominee levy to Smith
13 Barney, covering the personal retirement account of Dr. Cheung, and the Company’s
14 corporate investment account there. (Ex. 73, Ex. 75) Service occurred on February 27, 2003.
15 (Ex. 75; Ex. 127, p. US132)

16 38. At the time of the Smith Barney seizure, the IRS knew that “unfortunately” Dr.
17 Cheung was not an authorized signatory on the Company’s corporate investment account.
18 (Ex. 127).

19 39. At the time of the Smith Barney seizure, the IRS did not have any specific
20 information about Dr. Cheung making any withdrawals from, or deposits to, the Company’s
21 corporate investment account.

22 40. Cecile Cheung, Ronald Cheung, and Linda Su were the only authorized
23 representatives of the Company to take actions on the Smith Barney corporate investment
24 account as of February 20, 2003. (Ex. 104)

1 41. On February 21, 2003, Special Agent Molly Mahoney faxed IRS Agent,
2 Michael Kolpack, account documentation for accounts at Smith Barney, including the
3 Company's corporate investment account, showing Linda Su, Cecile Cheung, and Ronald
4 Cheung as the only "Authorized Persons" to trade on the account. (Ex. 76)

5 42. At the time that the Company's Smith Barney corporate investment account
6 was seized, there was no evidence of any effort to move the funds out of the Company's
7 corporate investment account.

8 43. A group meeting of IRS officials was held on February 27, 2003 to approve the
9 levy on the Smith Barney accounts, and the IRS subsequently received \$69,365.00 from Dr.
10 Cheung's personal retirement account and \$708,985.00 from the Company's corporate
11 investment account on April 11, 2003. (Ex. 127, p. US138)

12 44. On February 27, 2003, another Notice of Jeopardy Levy and Right of Appeal
13 was issued and served on the Company as nominee of Dr. Cheung. (Ex 74)

14 45. Dr. Cheung did not have control or beneficial ownership of the funds in the
15 Company's Smith Barney corporate Investment Account when they were seized.

16 46. Officer Kolpack testified that he did not know anyone in the Government that
17 had any knowledge or facts showing Dr. Cheung's continued control over the Company after
18 the Company changed its officers and directors.

19 47. Subsequent to the Smith Barney levy, Revenue Officer Kolpack searched for
20 other lien assets of the Company to seize, including real property, to satisfy the balance of
21 the jeopardy assessment.

22 48. On March 3, 2003, a notice signed by the Territory Manager of the IRS was
23 addressed to and served on the Company, as the nominee of Dr. Cheung, stating that a levy
24 has been issued "to collect the amount you owe", which notice also included two attached
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1 “Statements of Information” reflecting the IRS’ alleged bases for making the nominee levy
2 on the Company. (Ex. 67)

3 49. As one of the steps toward liquidation of the Company’s real property, Officer
4 Kolpack assembled ownership and title information about the Company’s real property and
5 informed Allen Bentley and Robert McCallum, acting as counsel for the Company, that he
6 would use any and all means to collect the remainder of the assessment from those assets.

7 50. As a step in the process of liquidating the Company’s real property to satisfy
8 the balance of the assessment against Dr. Cheung, Officer Kolpack acquired detailed
9 information about the real property assets of the Company’s subsidiary, West Coast Land
10 Investments. (Ex. 80, 81 & 82)

11 51. Attorneys Allen Bentley, Robert McCallum, and later William Shannahan,
12 discussed with Revenue Officer Kolpack the possibility of the Company paying the rest of the
13 assessment in lieu of continued levy efforts against the remaining property of the Company,
14 including forced sale of Company properties. (Ex. 127)

15 52. Pursuant to a letter dated May 8, 2003, Mr. Shannahan arranged for a check in
16 the amount of \$372,012.83 to be delivered by Robert McCallum, on behalf of the Company to
17 Revenue Officer Kolpack which satisfied the remainder of the assessment against Dr. Cheung
18 as of May 12, 2003. (Ex. 87)

19 53. This payment was not “voluntary”; rather it was made pursuant to the
20 Government’s levy efforts.

21 54. There was no evidence adduced that the \$372,012.83 in funds for the check
22 arranged (and forwarded) by Mr. Shannahan came from Dr. Cheung or any person or entity
23 under his control.
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1 55. The loan from Morley Su to the Company to fund the \$372,012.83 check
2 arranged by Mr. Shannahan was fully paid back out of the Company's corporate checking
3 account at Washington Mutual on August 26, 2003. (Ex. 135)

4 56. Dr. Cheung did not have control or beneficial ownership of the funds from
5 which the check arranged by Mr. Shannahan were drawn at the time it was received and
6 cashed by the Government.

7 57. The Government has failed to prove, by substantial evidence or a
8 preponderance of the evidence, a nexus between the Company's Bank of America corporate
9 checking account which was levied upon and Dr. Cheung.

10 58. The Government has failed to prove, by substantial evidence or a
11 preponderance of the evidence, a nexus between the Company's Smith Barney corporate
12 investment account which was levied upon and Dr. Cheung.

13 59. The Government has failed to prove, by substantial evidence or a
14 preponderance of the evidence, a nexus between the check arranged by William Shannahan to
15 the IRS and Dr. Cheung.

16 **CONCLUSIONS OF LAW³**

17 1. The Company has standing to pursue its claims.

18 2. The levy on the Company's Bank of America corporate checking account was
19 wrongful, and plaintiff is entitled to recover \$353,575.93 with interest from March 31, 2003.

20 3. The levy of the Company's Smith Barney corporate investment account was
21 wrongful, and plaintiff is entitled to recover \$708,985.00 with interest from April 11, 2003.
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³ To the extent that any Conclusion of Law is more properly characterized as a Finding of
25 Fact, the Court adopts it as such. To the extent that any Finding of Fact is more properly
26 characterized as a Conclusion of Law, the Court adopts it as such.

It is the Order of this Court that judgment is hereby awarded to plaintiff Steven N.S. Cheung, Inc. against the defendant United States of America in the amount of \$1,434,573.76 plus interest as provided by law.

Said judgment to be entered accordingly.

IT IS HERBY ORDERED this 24 day of October, 2006.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Attorneys for Plaintiff

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1 Steven N.S. Cheung Inc.

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PLAINTIFF'S PROPOSED ADDITIONAL
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